Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

YOLANDA FRANK,

Petitioner,

v.

HARRIS COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's granting a judgment as a matter of law in favor of Harris County, despite a twelve member jury's findings that Harris County, through one of its Constables, sexually harassed Yolanda Frank, another employee, and then terminated her employment in violation of Title VII. The jury awarded Ms. Frank over $400,000.00 in back pay and compensatory damages. In affirming the district court, the Fifth Circuit relied primarily on the reason that, as an elected official, the sexual harasser-Constable was not an "employee" under Title VII and, thus, Harris County could not be held liable. Yet, the federal case law has consistently held that the employee exclusions under Title VII prevents those "excluded" from *invoking* the protections of Title VII - it is more an issue of standing. In fact, there is a direct conflict between the Fifth Circuit's holding in this case and at least one other Court of Appeals. Petitioner believes this may be a case of first impression for this Court.

Four questions are presented:

1. Does the "elected official" exception to the definition of "employee" under 42 U.S.C. § 2000e(f) apply when the elected official is the perpetrator of the Title VII violations?

2. Can an employer be held liable to an employee under Title VII if the perpetrator is not an "employee" under 42 U.S.C. § 2000e(f)?

3. Is the purpose of the definition of "employee" under 42 U.S.C. § 2000e(f) to determine if the aggrieved party has standing to assert a Title VII claim?

4. Is an employer liable under Title VII for the acts of its "agent," under 42 U.S.C. § 2000e(b), if that "agent" is not an "employee" under 42 U.S.C. § 2000e(f)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
TABLE OF APPENDICES	x
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
A. The Sexual Harassment.	6
B. The Retaliation.	6
REASONS FOR GRANTING THE PETITION	9
I. Review Is Warranted To Resolve A Conflict Between The Courts Of Appeal Concerning The Scope And Application Of The "Elected Official/Personal Staff" Exclusion To The Definition Of "Employee" Under 42 U.S.C. § 2000e(f).	13

Contents

Page

A. The Fifth Circuit's Holding Conflicts with Other Circuits as to the Interpretation and Purpose of the "Employee" Exclusion Definition. 13

B. The Legislative History of the "Personal Staff" Exclusionary Language of 42 U.S.C. § 2000e(f), Stating That the Exclusion Is to Be Narrowly Construed, Warrants That the "Elected Official" Exclusion Be Interpreted and Applied in Favor of Petitioner. 15

C. This Is a Case of First Impression Before this Court. 16

II. Review Is Warranted In Order To Protect Employees Whom Work For A Governmental Entity And Are Subjected To Unlawful Discrimination By An Elected Official. 17

A. The "Elected Official" Exception to the Definition of "Employee" under 42 U.S.C. § 2000e(f) Does Not Apply When the Elected Official Is the *Perpetrator*. 17

B. The Evidence Proved That Constable Chambers Was An Employee Of Harris County. 21

Contents

Page

III. Review Is Necessary To Define The Scope Of The "Elected Official/Personal Staff" Exclusion To The Definition Of "Employee" Under 42 U.S.C. § 2000e(f). 23

IV. Review Is Warranted Because The Fifth Circuit Incorrectly Held That An Elected Official Cannot Be An Agent Of The Employer. 24

V. Review Is Warranted Because, Despite The "Elected Official - Employee" Issue, Harris County Is Liable Since Constable Chambers Is Its "Agent" Under The Definition Of "Employer" In Title VII. 25

VI. Review Is Warranted Because The Government Employee Rights Act Of 1991 Does Not Apply In This Case To Give Petitioner A Means To Pursue Her Title VII Claims. 26

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Page

United States Supreme Court Cases

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 20, 24

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 20, 24

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 20

Federal Appeals Cases

Anderson v. City of Albuquerque,
690 F.2d 796 (10th Cir. 1982) 11, 15

Butler v. New York State Department of Law,
211 F.3d 739 (2nd Cir. 2000) 10

Carver v. Sheriff of LaSalle County, Illinois,
243 F.3d 379 (7th Cir. 2001) 18

Curl v. Reavis,
740 F.2d 1323 (4th Cir. 1984) 10

Cromer v. Brown,
88 F.3d 1315 (4th Cir. 1996) 10

E.E.O.C. v. Reno,
758 F.2d 581 (11th Cir. 1985) 18

Cited Authorities

Page

Goldsmith v. City of Atmore,
996 F.2d 1155 (11th Cir. 1993) ..... *passim*

Gunaca v. State of Texas,
65 F.3d 467 (5th Cir. 1995) 19

Harvey v. Blake,
913 F. 2d 226 (5th Cir. 1990) 24, 26

Montgomery v. Brookshire,
34 F.3d 291 (5th Cir. 1994) 18, 20

Owens v. Rush,
654 F.2d 1370 (10th Cir. 1981) 10, 20

Taplin v. Johnson,
90 Fed. Appx. 736, 2004 WL 256547 (5th Cir.) ... 19

Teneyuca v. Bexar County,
767 F.2d 148 (5th Cir. 1985) 14, 19, 20

Starrett v. Wadley,
876 F.2d 808 (10th Cir. 1989) 10, 14

Williams v. Banning,
72 F.3d 552 (7th Cir. 1995) 18

Yolanda Frank v. Harris County,
2004 WL 2914035 (5th Cir. Decided December 15,
2004) 1, 14, 18

Cited Authorities

Page

District Court Cases

Beckman v. Darden,
351 F. Supp.2d 139 (S.D.N.Y. 2004) 10

Decker v. University of Houston,
970 F. Supp. 575 (S.D. Tex. 1997) 27

Frank v. Harris County,
Civil Action H-99-2383 (S.D.Tex. 2002) 22, 24

Gomez v. City of Eagle Pass,
91 F. Supp.2d 1000 (W.D. Tex. 2000) 11, 20-21

Moore v. Harris County,
Civil Action H-98-1776 (S.D. Tex May 31,
2001) 21

Wilson v. Sysco Food Services of Dallas, Inc.,
940 F. Supp. 1003 (N.D. Tex. 1996) 24, 26

Federal Statutory and Constitutional Laws

42 U.S.C. § 1983 ..... 4, 9

42 U.S.C. § 2000(b) 18

42 U.S.C. § 2000e 1

42 U.S.C. § 2000e(a) 25

42 U.S.C. § 2000e(b) ..... ii, 10, 13, 14, 24

Cited Authorities

Page

42 U.S.C. § 2000e-2 ..... 2, 3, 23

42 U.S.C. § 2000e(f) ..... *passim*

42 U.S.C. § 2000e-5(g) 25

42 U.S.C. § 2000e-16a 3

42 U.S.C. § 2000e-16a - 16c 3, 4, 26

42 U.S.C. § 2000e-16c 3

State Statutory Law

TEX. LOC. GOV'T CODE ANN. § 86.011(a) (Vernon 2003) 21, 22

TEX. LOC. GOV'T CODE ANN. § 151.002 (Vernon 2003) 21

TEX. LOC. GOV'T CODE ANN. § 151.003 (Vernon 2003) 21

TEX. LOC. GOV'T CODE ANN. § 152.001 (Vernon 2003) 21, 22

TEX. LOC. GOV'T CODE ANN. § 152.011 (Vernon 2003) 21, 22

Miscellaneous

1972 U.S. Code Cong. & Ad. News 2137 15

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed December 15, 2004 ..... 1a

Appendix B — Memorandum Opinion Of The United States District Court For The Southern District Of Texas, Houston Division Entered September 19, 2003 ..... 12a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed January 19, 2005 ..... 31a

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported in 2004 WL 2914035 (5th Cir. Decided December 15, 2004). *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on December 15, 2004. (*See* Appendix A). Petitioner filed a Petition for Panel Rehearing on January 5, 2005 which was denied on January 19, 2005 (*See* Appendix C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 2000e.

Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the

Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2101 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

. . .

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign county, such terms includes an individual who is a citizen of the United States.

. . .

Title 42 United States Code, Section 2000e-2.

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title 42 United States Code, Section 2000e-16a.

Short title; purpose; definition

(a) Short title

Sections 2000e-16a to 2000e-16c of this title may be cited as the "Government Employee Rights Act of 1991."

(b) Purpose

The purpose of sections 2000e-16a to 2000e-16c of this title is to provide procedures to protect the rights of certain government employees, with respect to

their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

. . .

Title 42 United States Code, Section 2000e-16c.

Coverage of previously exempt State employees

(a) Application

The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof —

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

STATEMENT OF THE CASE

Petitioner Yolanda Frank asserts that former Constable A. B. Chambers ("Constable Chambers") subjected her to sexual harassment while she was employed as a deputy by Harris County, Texas, at Precinct 7 and filed suit under Title VII of the Civil Rights Act of 1964, claiming quid pro quo sexual harassment, and also under 42 U.S.C. § 1983 for deprivation of civil rights.

1. In 1995, Ms. Frank was a 32-year old, happily married mother of three, who graduated in the top 5 out of 60 people in University of Houston's law enforcement academy. In 1996, Harris County's Precinct 7 commissioned her as a non-paid reserve deputy, a trainee position to become a deputy. At that time, Constable Chambers had been Constable at that precinct for many years, and was employed at, and he received his compensation from, Harris County. As Constable of Precinct 7, Chambers was Ms. Frank's supervisor. The county has had, at all pertinent times over fifteen employees, and, through Constable Chambers, interviewed Ms. Frank for a deputy constable position and hired her. Her first paid position was as Absent Student Assistance Program ("ASAP") deputy constable. This program is funded by the Houston Independent School District ("HISD") for nine months during the school year but the deputy constables also work during the summer months at Precinct 7.[1]

Just after starting her paid position in ASAP, on or around December 23, 1996, through October of 1998, when she was fired in retaliation for rebuffing Constable Chambers' sexual advances, Ms. Frank was subjected to sexual harassment. She then suffered retaliation for her constant rejections of the harassment by being terminated from employment — all in violation of Title VII.

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1. Deputy constables in the ASAP division worked under contract for HISD funded program during the school year but were under different programs during the summer. Being a deputy constable is a continuous job much like an HISD teacher is considered full-time even though a teacher does not work during the continuous job much like an HISD teacher is considered full-time even though a teacher does not work during the summer. Only as a deputy constable was Ms. Frank qualified for certain work assigned by the Constable's office, all ASAP deputies continued to work during the entire year, Ms. Frank had worked in the summer of 1997 for Precinct 7, and expected to do so and did during the summer of 1998.

Although there were other instances, at trial Ms. Frank related at least six incidents of flagrant and increasing vile sexual harassments and/or sexual assaults that she rejected, at which time he commenced retaliating against her with the help of his fiefdom of cronies.

A. The Sexual Harassment.

Ms. Frank was hired as a deputy constable making $2,014.00 per month. The first incident of sexual harassment occurred on or around of her hire date when Constable Chambers pretextually shook Ms. Frank's hand to great her, then grabbed her by the waist and pulled her to a corner, gave her a kiss on the check, and told her his wife did not approve of him kissing the girls so Ms. Frank was to come into his office to kiss him.

Other incidents followed over the course of several months including Constable Chambers isolating Ms. Frank in his office, touching her breasts, forcefully kissing her and other sexually offensive conduct, all to her disapproval and disgust. He even asked her to join him at the Warwick Hotel in Houston where he had told her he had a room. Practically all of these incidents occurred in Constable Chambers' office.

B. The Retaliation.

In early January, 1998, Constable Chambers grabbed Ms. Frank's hand to his side and required that she go to his office. Ms. Frank had had enough of the constant stalking and harassment by Constable Chambers. She did not initially go to his office but later decided to take this opportunity to expressly tell Constable Chambers she was not interested in him sexually. She collected some pictures of her children, went to his office on or about January 11th, and proceeded to tell him she was not interested in the kindest way possible by showing him she was a family person and wanted to focus just on her job at work.

This express rejection by Ms. Frank of Constable Chambers' order for sexual favors, despite the integrity Ms. Frank built into it, was the catalyst for a barrage of retaliation inflicted upon Ms. Frank by Constable Chambers' directive that ultimately resulted in her unlawful termination on October 18, 1998.

From January 1998 through October 1998, Ms. Frank was tortured by the infantile behavior and "set-ups" adduced and condoned by Constable Chambers of his deputies toward Ms. Frank as a means to run her off because she had rejected Constable Chambers' desire for her to be sexually receptive and sexually active with him.

To Ms. Frank's horror, the retaliation took on different forms and the incidents of retaliation commenced almost immediately. One of the first retaliation incidents was on or around January 15, 1998 when Captain Spivey paged Ms. Frank hundreds of times. He responded when she returned his calls that she was crazy and he did not page her.

On April 15, 1998, Ms. Frank submitted a request for transfer or consideration for promotion that Harris County and Precinct 7 ignored. On September 23, 1998, she made a written request for a meeting because she was stressed at work. Although a meeting did take place, nothing was resolved. She looked for another job.

Ms. Frank sought out other employment but was not successful, so on September 2, 1998, Ms. Frank entered another formal ASAP employee contract with Harris County despite the retaliation because she needed the money to support her family. However, the retaliation continued. Constable Chambers' cohorts were not successful in getting Ms. Frank to voluntarily resign so they literally fabricated violations Ms. Frank allegedly

committed and generated write-ups to documents their files.[2] On October 14, 1998, Ms. Frank was terminated from her employment effective October 16, 1998.

Ms. Frank filed her Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") in February 1999 and thereafter received her "right to sue" letter. She filed her Original Complaint in the United States District Court for the Southern District of Texas on July 26, 1999 claiming

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2. These write-ups were so poorly thought out that Ms. Frank was not even at work on several of the dates the alleged infractions occurred. On August 22, 1998, Ms. Frank was written up for failing to report for duty but she was not assigned duty on Saturdays. Further, she would have shown up had she been told the function was scheduled and mandatory. On August 29, 1998, she was written up for failing to follow a direct order to release a juvenile to school at 4:00 p.m. when not only did she not work that day, it was a Saturday and there would be no children at school anyway. On September 25, 1998, she was written up for insubordination but the write-up does not setout what she did–because it was a completely fabricated "write-up" to support firing her. Finally, she was written up on October 9, 1998 for not picking up an attendance list after she was off-duty from Ryan Middle School, a location that could fax it, on an evening she had already told her supervisor's was the evening her daughter was being inducted into the National Honor Society and Constable Chambers' co-horts intentionally kept assigning her fabricated after-work orders to keep her at work to frustrate her attempt at being at her daughter's ceremony. Her daughter started to walk home because Mr. Frank arrived so late to pick her up due to a "riot" at Worthing High School–which "riot" did not exist as not one other unit but Ms. Frank was called to Worthing. Clearly the "incidents" of "insubordination" were pretexual to justify firing Ms. Frank when the real reason Constable Chambers wanted her gone was because she rebuffed him and did not want any of his people disrespecting his authority.

Title VII violations as well as violations of 42 U.S.C. § 1983.[3] The case was tried to a twelve member jury in April 2003, which resulted in a verdict in favor of Ms. Frank finding Title VII violations and awarding Ms. Frank damages totally over $400,000. The overwhelming evidence supported the jury's verdict.

Based upon post-trial motions, the district court entered a Final Judgment in favor of Respondent Harris County on September 18, 2003 on all of Ms. Frank's claims (Appendix B). On October 8, 2003, Ms. Frank filed her Notice of Appeal. The Fifth Circuit's decision was entered on December 15, 2004 affirming the district court (Appendix A). The Fifth Circuit focused primarily on the issue of Constable Chambers' status as an "employee" under Title VII and concluded that Harris County was not liable since Constable Chambers was not an "employee" under the Title VII definition. It also held that Harris County did not have sufficient knowledge of other Title VII violations at Precinct 7 to impart liability to Harris County for Chambers' conduct as a non-employee.

After obtaining an extension of time, the Petitioner timely filed her Petition for Panel Rehearing on January 5, 2005. On January 19, 2005, the Fifth Circuit denied the Petitioner for Panel Rehearing (Appendix C).

REASONS FOR GRANTING THE PETITION

Title VII was enacted to prevent discrimination in the workplace and to provide an avenue of recovery for those employees whom have been so discriminated against. Sexual harassment is a form of discrimination in violation of Title VII. Harris County meets the definition of "employer," and Ms. Frank

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3. Petitioner's § 1983 claim was dismissed prior to trial via summary judgment and is not addressed in this Petition for a Writ of Certiorari.

is clearly an "employee," under 42 U.S.C. § 2000e(b) and (f), respectively. Both the district court and the Fifth Circuit Court of Appeals held such. (*Yolanda Frank v. Harris County*, Slip op., p. 7). Yet, the Fifth Circuit went further and held that, because the individual sexual harasser — Harris County Constable A. B. Chambers — was elected to his position, he is not an "employee" under § 2000e(f) and, hence, Harris County cannot be held liable for his actions under the exemption language contained in 2000e(f).[4] The Fifth Circuit then held that, as an alleged non-employee, Harris County was not liable for Title VII violations.

Yet the overwhelming majority of other jurisdictions have applied this exclusion in the opposite manner — that the "elected official/personal staff" exclusion under 42 U.S.C. § 2000e(f) applies when the "elected official/personal staff" individual is the claimant under Title VII — not the perpetrator.[5] In addition,

4. The definition of "employee" under 42 U.S.C. § 2000e(f) of Title VII excludes persons elected to office or such persons chosen by that elected officer to be on his/her "personal staff." Clearly, Ms. Frank was not a "personal staff" individual, and neither Ms. Frank nor Harris County have ever taken such position. The evidence at trial unequivocally proved she was a *de facto* and *de jure* employee of Harris County, and not on Constable Chambers' personal staff. Thus, the "personal staff" exclusion as to Ms. Frank is not applicable to Ms. Frank, and is not an issue in this case. However, most cases based upon the employee exclusion issue involve the "personal staff" exemption and so the discussion as to that exclusion would pertain to the "elected official" one as well.

5. *See Starrett v. Wadley*, 876 F.2d 808, 821 (10th Cir. 1989); *Butler v. New York State Department of Law*, 211 F.3d 739, 744 (2d Cir. 2000); *Curl v. Reavis*, 740 F.2d 1323 (4th Cir. 1984); *Cromer v. Brown*, 88 F.3d 1315, 1323-4 (4th Cir. 1996); *Owens v. Rush*, 654 F.2d 1370, 1374 (10th Cir. 1981) [Title VII Plaintiff must show he is an "employee" under 42 U.S.C. § 2000e(f)]; *Beckman v. Darden*, 351 F. Supp. 2d 139, 144 (S.D.N.Y. 2004) ("Title VII excludes from the scope of its protections

(Cont'd)

at least one Court of Appeals has specifically held that a governmental employer is still liable under Title VII to one of its employees for the actions of one of its elected officials. The central purpose of 42 U.S.C. § 2000e(f) is one of standing — to determine if the aggrieved person is an "employee" under Title VII such that they can come under its protection. It is not meant to be used as a shield by the employer to escape liability, based upon the fact that its own employee-perpetrator happens to fall under the exclusionary language, when that very same perpetrator works for that employer and is paid for services rendered on its behalf. This conflict among these Courts of Appeal should be addressed by this Court.

In fact, in a similar case, the Fifth Circuit had just previously opined that the "elected official/personal staff" exception to the definition of an "employee" meant that if the Title VII *victim of harassment* is an elected official/personal staff member, that person may not *invoke* the protection of Title VII. In the case at bar, it is not the aggrieved party (Ms. Frank) who falls under the "elected official/personal staff" member, but the perpetrator — Constable Chambers — who was the "elected official." The Fifth Circuit held that, since Constable Chambers', as an elected official, does not fall within the definition of "employee" under § 2000e(f), then Harris County — which was Constable Chambers' employer in every other capacity — could not be held liable unto Ms. Frank's for his sexual harassment.[6] This

(Cont'd)
any elected official's appointee J. . ."); *Anderson v. City of Albuquerque*, 690 F.2d 796, 800-1, (10th Cir. 1982); *Gomez v. City of Eagle Pass*, 91 F. Supp. 2d 1000, 1005-6 (W.D. Tex. 2000).

6. Constable Chambers testified at trial he was employed by Harris County, was paid by it and that he answers to Harris County. In fact, in a previous case involving the very same allegations against Constable Chambers and Harris County by another female deputy constable, the county had conceded it was Constable Chambers' employer and was responsible for him in his official capacity.

holding runs contrary to its previous opinion, and to cases in other Courts of Appeals, on this very issue.[7] The Fifth Circuit's holding renders Title VII inapplicable to a victim of sexual harassment inflicted by an elected official, when both individuals have the same employer. There are cases from other jurisdictions that hold exactly the same as the Fifth Circuit did in a prior case it ruled upon in 2004. The Fifth Circuit should have followed the reasoning in that earlier case and in those in other Courts.

Ms. Frank's only recourse was against her employer — Harris County. She cannot sue Constable Chambers individually because, under Title VII, only the "employer" is liable. Thus, as found by the district court, any lawsuit Ms. Frank would have filed against Constable Chambers, individually, would be in his official capacity since Constable Chambers cannot be held individually liable.

This case has far reaching effects on those public employees who are subjected to Title VII violations, yet cannot seek protection under Title VII because of the skewed interpretation of the "elected official" exclusion invoked by the Fifth Circuit. To adopt the interpretation of this exclusion in the manner as the Fifth Circuit did in this case would prevent a broad class of Title VII victims to any protection from, and redress for, unlawful discrimination. There are untold numbers of public employers, with elected officials, throughout the United States. Literally thousands of local government employees could be subjected to constant Title VII violations by the elected official, without any avenue of recovery. In addition, the Fifth Circuit Court of Appeals' interpretation, and ruling based thereon, conflicts with the legislative history that the exclusion language be narrowly interpreted.

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7. The cases are cited in Footnote 5 and discussed, *infra*, in Sections I and II.

The Fifth Circuit also made a glaring error in overlooking that Constable Chambers is an agent of Harris County, and, as such, the county is liable pursuant to 42 U.S.C. § 2000e(b).

Review by this Court is therefore necessary to address this discrepancy in this "elected official" exclusion to the "employee" definition contained in Title VII, and the split among the Fifth Circuit and at least one other Circuit. The Fifth Circuit Court of Appeals' interpretation and ruling in this case is not in line with its own prior ruling, nor with the plethora of cases from other circuits and ignores the vicarious liability provisions in 42 U.S.C. § 2000e(b).

I. Review Is Warranted To Resolve A Conflict Between The Courts Of Appeal Concerning The Scope And Application Of The "Elected Official/Personal Staff" Exclusion To The Definition Of "Employee" Under 42 U.S.C. § 2000e(f).

A. The Fifth Circuit's Holding Conflicts with Other Circuits as to the Interpretation and Purpose of the "Employee" Exclusion Definition.

The Fifth Circuit's decision squarely conflicts with the holdings of other Courts which have held that a person excluded as an employee under the "elected official/personal staff" provision of § 2000e(f) cannot *invoke* the protections under Title VII, and that the perpetrator — elected official's employer is not exempt from liability under that same exclusion. (*See* Section II, *infra*, on the discussion of the "elected official" exclusion to a Title VII "employee"). The salient case on this issue is *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993). (City held liable for Title VII violation for acts of its elected mayor in retaliating against city employee/plaintiff). (*See* cases cited in Footnote 5, *supra*).

In *Goldsmith*, the Eleventh Circuit Court of Appeals had before it a case directly on point with the instant case. In addressing the defendant - city's argument that the definition of "employee" under 42 U.S.C. § 2000e(f) excludes the elected mayor thus negating liability, the Court stated:

> The City suggests that Title VII's definition of "employee," *see* 42 U.S.C.A. § 2000e(f), governs the scope of agency liability under Title VII. Title VII defines "employee" to limit the class of workers entitled to protection against lawful employment practices, specifically excluding "any person elected to public office" from Title VII protection. *See, e.g., Starrett v. Wadley*, 876 F.2d 808, 820-22 (10th Cir. 1989); *Teneyuca v. Bexar County*, 767 F.2d 148, 150-53 (5th Cir. 1985). Because of Title VII's definition of "employee" exempts elected officials from Title VII protection, the City argues that Mayor Shell should also be exempt from Title VII liability. We reject this argument. Title VII's definition of "employer" incorporates liability for the act of "any agent" subject only to separate limitations not at issue in this case. *See* 42 U.S.C.A. § 2000e(b) (emphasis added).

Goldsmith v. City of Atmore, 1162, Footnote 10. The case makes clear the purpose of the employee exclusion language in § 2000e(f).

Yet, in the case at bar, the Fifth Circuit, to reach its decision, skewed the ramifications of the "elected official/personal staff" exclusion. Contrary to *Goldsmith*, it incorrectly held that, since Constable Chambers was elected to his position, he could not be an "employee" of Harris County and, thus, Harris County could not be liable to Ms. Frank. (*Frank v. Harris County*, Slip. Op. p. 7). This holding by the Fifth Circuit is totally contrary to,

and inconsistent with, other jurisdictions' interpretation of the employee exclusionary language of 42 U.S.C. § 2000e(f) and directly conflicts with Eleventh Circuit's holding in *Goldsmith v. City of Atmore*. This substantive discrepancy needs to be resolved.

B. The Legislative History of the "Personal Staff" Exclusionary Language of 42 U.S.C. § 2000e(f), Stating That the Exclusion Is to Be Narrowly Construed, Warrants That the "Elected Official" Exclusion Be Interpreted and Applied in Favor of Petitioner.

As set forth above, the vast majority of the cases addressing the employee exclusion of § 2000e(f) involve whether an individual claimant is on the personal staff of an elected official, and not an elected official themself. The legislative history of 42 U.S.C. § 2000e(f) shows that Congress intended the exclusion to be narrowly construed. *Anderson v. City of Albuquerque*, 690 F.2d 796 (10th Cir. 1982). The House and Senate conference committee report on this section provides, in pertinent part:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees (sic) intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted. *1972 U.S. Code Cong. & Ad. News 2137, 2180. Anderson v. City of Albuquerque*, 696 F.2d at 800.

Courts have narrowly applied the factors to determine if a particular person was a personal staff member, and is, therefore, excluded from the protection of Title VII. Thus, this Court should, consistent with the legislative history, narrowly construe this provision and hold that it only applies to those elected officials/personal staff members who *file* a Title VII claim and, correspondingly does not insulate the employer merely because the perpetrator is elected to office. To apply this provision otherwise, as the Fifth Circuit did, would conflict with the legislative intent.

C. This Is a Case of First Impression Before this Court.

Based upon Ms. Frank's examination of the case law, there appears to be no prior pronouncement by this Court as to whether the "elected official/personal staff" employee exemption under 42 U.S.C. § 2000e(f) shields the employer from liability under Title VII in those instances wherein the person inflicting the discrimination is an elected official and is a *de facto* employee.

Additionally, as set forth in Section V below, this case is unique because it presents an additional theory of Harris County's liability despite the employee exclusionary language of 42 U.S.C. § 2000e(f) — that the definition of "employer" in 2000e(f), includes any ". . . agent of such person . . ." [i.e. the employer]. Harris County Constable A.B. Chambers is certainly an agent of that very county. Thus, this issue should be addressed by the Court as well.

II. Review Is Warranted In Order To Protect Employees Whom Work For A Governmental Entity And Are Subjected To Unlawful Discrimination By An Elected Official.

A. The "Elected Official" Exception to the Definition of "Employee" under 42 U.S.C. § 2000e(f) Does Not Apply When the Elected Official Is the *Perpetrator*.

Title VII was promulgated and enacted to protect employees in the workplace from discrimination. The jury found that Constable Chambers sexually harassed Ms. Frank and then terminated her in violation of Title VII.

Title VII employees are specifically defined, to-wit:

> The term **"employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff**, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of the State government, governmental agency or political subdivision. With respect to employment in a foreign country, such terms includes an individual who is a citizen of the United States.

42 U.S.C. § 2000e(f) (emphasis added). The Age Discrimination in Employment Act ("ADEA") has an identical exemption to § 2000e(f) of Title VII. Thus, the Courts look to those cases construing the parallel provision in § 630(f) of the ADEA in

determining the "elected official/personal staff" employee exclusion in Title VII cases. *Montgomery v. Brookshire*, 34 F.3d 291 (5th Cir. 1994), *E.E.O.C. v. Reno*, 758 F.2d 581 (11th Cir. 1985). Ms. Frank cannot sue Constable Chambers under Title VII — he is not her employer and only her employer is liable under Title VII. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995), *Carver v. Sheriff of LaSalle County, Illinois*, 243 F.3d 379 (7th Cir. 2001). Harris County satisfies all elements to be an "employer" under 42 U.S.C. § 2000(b).

In its Opinion, the Fifth Circuit references the district court's holding that, since the harasser/perpetrator was Constable Chambers, whom is elected to office, he is thus not an "employee" under the exception language in § 2000e(f). The Fifth Circuit then reasoned Harris County cannot be his employer and thus no liability to be imposed on Harris County. (*Yolanda Frank v. Harris County*, Slip Op. - p. 7). But that inquiry is not necessary and, in any event, is incorrect. The Court failed to address this issue under the facts of this case, vis-a-vis whether the "elected official" exception insulates the employer's liability, when the perpetrator, *not the aggrieved party/claimant*, is an elected official.[8] The "elected official" employee exception bars an elected official from *seeking recovery under Title VII*, but does not shield the employer (Harris County) from liability when the sexual harasser/employee (Constable Chambers) is an elected official. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993). To hold otherwise would mean that an employee who is discriminated against by their boss, an elected official, has absolutely no rights under Title VII.

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8. Practically every case arising under Title VII wherein the "elected official/personal staff" issues occur involve whether the individual is deemed a personal staff member, and not an "elected official." However, the analogy and applicability of those cases are on point and germane to those involving an "elected official," since both exclusions are contained in the very same sentence in the § 2000e(f) exclusion.

In *Taplin v. Johnson*, 90 Fed. Appx. 736, 2004 WL 256547 (5th Cir., Feb. 11, 2004), the Fifth Circuit most recently addressed the issue of a "personal staff" individual bringing a Title VII claim. In its ruling, the Court found that the plaintiff therein, Etta Taplin, was a member of the perpetrator-sheriff's personal staff and stated:

> Sheriff Johnson and Ms. Johnson claim that Taplin was a member of Sheriff Johnson's "personal staff" and, therefore, that she may not bring suit against them under Title VII. *Title VII excludes from its protection* **"any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on** such officer's personal staff." 42 U.S.C. § 2000e(f) (2000) (defining "employer" for purposes of Title VII.) (emphasis added)

Taplin, p. 738 (emphasis added). It is this holding by the Fifth Circuit that, although contained in an unpublished opinion, sheds light on the intent and purpose of the "elected official" exception to the definition of employee — to prevent an elected official from invoking the rights and remedies under Title VII — not to insulate the employer from the wrongful conduct of the elected official. It is also consistent with holdings in other jurisdictions. (See Footnotes 5 and 6). In several cases prior to *Taplin v. Johnson*, the Fifth Circuit employed this same analysis — that the employee exclusion language is utilized in determining if the claimant therein was an "employee" under Title VII and, thus, could bring a Title VII claim: *Teneyuca v. Bexar County*, 767 F.2d 148, 150 (5th Cir. 1985) (Position of assistant district attorney, for which claimant applied, found to be excepted as an "employee" position under Title VII), *Gunaca v. State of Texas*, 65 F.3d 467, 470-1 (5th Cir. 1995) (Plaintiff investigator

was a member of the personal staff of elected district attorney and thus not "employee" for ADEA claim).

However, in the case at bar, this very same Court ignored those prior holdings to reach its conclusion that the exclusion constitutes a defense to the employer when the perpetrator is not an "employee" under that same subsection. To interpret and utilize this "employee" exception in this context would give the elected official unbridled and unfettered ability to violate Title VII with no recourse by the victim against his/her employer. It is Ms. Frank's position that the definition of "employee" under 42 U.S.C. § 2000e(f) is primarily (though not exclusively) for purposes of ascertaining if the claimant is an "employee" — to have standing — to assert a Title VII claim. This definition is not for the employer to assert as to its employee-perpetrator.[9] As the Court is aware, Ms. Frank could not sue Constable Chambers under Title VII because he is not her employer. Therefore, under Title VII, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the county is vicariously liable. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Harris County is liable for Constable Chambers' sexual harassment. An examination of those Title VII cases in which the "elected official"/"personal staff" exceptions have arisen occur when the *victim/plaintiff* is the elected official/personal staff person, not when liability is imposed because the *perpetrator/sexual harasser* falls within one of those two exceptions, as in the case at bar. *See Montgomery v. Brookshire*, 34 F.3d 291 (5th Cir. 1994), *Teneyuca v. Bexar County*, 767 F.2d 198, 150 (5th Cir. 1985), *Gomez v. City of Eagle Pass*, 91

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9. *See Owens v. Rush*, 654 F.2d 1370, 1374 (10th Cir. 1981) [In order for the Plaintiff to prove Title VII violations, he must show that he was an "employee" under 42 U.S.C. § 2000e(f)].

F. Supp. 2d 1000, 1005-6 (W.D. Tex. 2000). Harris County cannot hide behind the cloak of Constable Chambers being an elected official; otherwise, persons such as Ms. Frank could be discriminated against *ad infinitum* by an elected official, with no legal recourse.

B. The Evidence Proved That Constable Chambers Was An Employee Of Harris County.

The evidence clearly showed that Constable Chambers was an employee of Harris County.

Harris County constables are employees under Title VII because they answer to the Harris County Commissioners' Court. Furthermore, at trial in response to questions by Ms. Frank's counsel, Constable Chambers himself testified that from 1996-98, he was employed by Harris County and was paid by it. He also said that in the administration of his duties as Constable, he answers to Harris County and the taxpayers. Employees are paid for their work by their employers. In a prior similar case, Harris County had conceded it was the employer and responsible for Constable Chambers' actions in his official capacity. *Moore v. Harris County, Texas*, No. H-98-1776, *5 n.4 (S.D. Tex. 2001) (quoting Memorandum and Order).

Texas exerts control over its constables by (1) determining if the constable has shown that it is "necessary to appoint a deputy in order to properly handle the business of the constable's office that originates in the constable's precinct," TEX. LOC. GOV'T CODE ANN. § 86.011(a); (2) determining and paying their salaries, TEX. LOC. GOV'T CODE ANN. §§ 152.001, 152.011; (3) withholding taxes and making payroll, *Moore v. Harris County*, No. H-98-1776 (S.D. Tex. 1998); determining the total number of deputy constables that can be appointed, TEX. LOC. GOV'T CODE ANN. §§ 151.002, 151.003; (5) specifically reviewing, approving, or denying each of the constable's

appointments, TEX. LOC. GOV'T CODE ANN. §§ 86.011(a), 151.003; and, (7) reviewing all necessary paperwork and setting a new salary if a deputy constable is promoted, TEX. LOC. GOV'T CODE ANN. §§ 152.001, 152.011. *Frank v. Harris County*, No. H-99-2383 7 (S.D. Tex. 2002) (Memorandum and Order for Defendant's Motion for Summary Judgment, and Memorandum Opinion of September 18, 2003). Constable Chambers' title is Constable of Harris County Precinct 7, and he is employed by Harris County. To hold otherwise would lead to the illogical conclusion that he did not have any employer during the many years he was Constable.

Of particular relevance to this issue is the Government Employee Rights Act ("GERA") contained in Title VII. It provides a procedural mechanism for those individuals, as defined in § 2000e-16(c), to bring a claim under Title VII against their governmental employer. Those persons who may invoke GERA are the personal staff/advisors who are normally deemed excluded as employees under § 2000e(f).[10] By enacting GERA as a means for those excluded as a personal staff member or constitutional advisor to an elected official, Congress clearly meant that the "elected official" exclusion under § 2000e(f) was only meant to *preclude* an elected officer from invoking the remedies of Title VII. Thus, GERA's purpose bolsters Ms. Frank's contention that § 2000e(f) pertains to standing of the aggrieved party. To hold otherwise would negate the very purpose of GERA.

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10. As discussed, in Section VI below, Ms. Frank is not a personal staff member of, nor a constitutional advisor to, Constable Chambers, and, therefore, cannot involve the procedures in GERA.

III. Review Is Necessary To Define The Scope Of The "Elected Official/Personal Staff" Exclusion To The Definition Of "Employee" Under 42 U.S.C. § 2000e(f).

Title VII provides a description of unlawful practices:

> Title 42 United States Code § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

It is noteworthy that this section does not make a distinction as to an "elected official/personal staff" as the Title VII harasser — it speaks of *individuals* and *employees'* protection. In other words, reading § 2000e-2(a) with the definition of "employee" under § 2000e(f), leads to the conclusion that an "elected official/ personal staff" person cannot *invoke* the protection under Title VII. No where does it appear that the employer cannot be held liable for the actions of one of its elected officials when that official is the violator of Title VII.

IV. Review Is Warranted Because The Fifth Circuit Incorrectly Held That An Elected Official Cannot Be An Agent Of The Employer.

The Fifth Circuit held that, since Constable Chambers — the Title VII perpetrator — was not an employee under 42 U.S.C. § 2000e(f), then Harris County could not be liable. (*Frank v. Harris County*, Slip Op. pp. 7 - 8). This runs contrary to the law. At least one other Court of Appeals has held that local governments are liable under Title VII for the acts of its elected official, inflicted on one of its employees, despite the exclusionary language of 42 U.S.C. § 2000e(f), because the elected official is acting as an agent for the governmental entity. *Goldsmith v. City of Atmore*, 996 F.2d 1155 (11th Cir. 1993). *See Harvey v. Blake*, 913 F.2d 226, 227-8 (5th Cir. 1990); *Wilson v. Sysco Food Services of Dallas, Inc.*, 940 F. Supp. 1003 (N.D. Tex. 1996) [Supervisor of employee in Title VII claim is "agent" of employer under § 2000e(b)]. Since both the district court and Fifth Circuit correctly held that Ms. Frank was an employee of Harris County, and since the county is not immune from liability on the "elected official" employee issue, then it is strictly liable because of Constable Chambers' position at Harris County and because he was Ms. Frank's supervisor: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The Fifth Circuit's holding that neither *Burlington Industries* nor *Faragher* apply was based upon the incorrect premise of Constable Chambers' status as a non-employee. As set forth above, that result stemmed from the Fifth Circuit's erroneous application of 42 U.S.C. § 2000e(f).

V. Review Is Warranted Because, Despite The "Elected Official - Employee" Issue, Harris County Is Liable Since Constable Chambers Is Its "Agent" Under The Definition Of "Employer" In Title VII.

The Definitions Section of Title VII defines "person" and "employer." The first step is to ascertain if the employing entity is a "person" under § 2000e(a), which includes ". . . governments, governmental agencies, political subdivisions . . ." The next step is to determine if the "person" is an "employer" under § 2000e(b), having the requisite number of employees, etc. Of critical importance is that "person" is defined to include "any agent of such a person."

The Eleventh Circuit Court of Appeals has specifically held that a city is liable under Title VII to one of its employees for the Title VII violations of its elected mayor. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993). In that case, the Eleventh Circuit stated:

> The City also argues that it was entitled to judgment as a matter of law on Goldsmith's Title VII claim because it cannot be held liable for the acts of Mayor Shell. We find this argument to be without merit. Under Title VII, an "employer" may be found liable for a Title VII violation upon a judicial finding "that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint." *See* 42 U.S.C.A. § 2000e-5(g). Title VII defines a potentially liable "employer" as any "person engaged in an industry affecting commerce . . . *and any agent of such person.*" 42 U.S.C.A. § 2000e(b) (emphasis added). [FN8] Goldsmith predicates her Title VII claim against the City on the City's liability for the unlawful employment practices of Mayor Shell as its agent.

> FN8. In turn, Title VII describes a "person" as incorporating, "governments" and "political subdivisions." *See* 42 U.S.C.A. § 2000e(a).

Goldsmith, 996 F.2d at 1161-2. *Accord Harvey v. Blake*, 913 F.2d 226, 227-8 (5th Cir. 1990); *Wilson v. Sysco Food Services of Dallas, Inc.*, 940 F. Supp. 1003, 1008-9 (N.D. Tex. 1996). *Goldsmith* is exactly the same with the case at bar on this issue. This Court should find that Harris County is liable.

VI. Review Is Warranted Because The Government Employee Rights Act Of 1991 Does Not Apply In This Case To Give Petitioner A Means To Pursue Her Title VII Claims.

42 U.S.C. § 2000e-16a through 16c, of Title VII are referred to as the Government Employment Rights Act of 1991 ("GERA") and was enacted to 'close the gap' between some individuals excluded as "employee" in the definition of "employee" in § 2000e(f) of Title VII. It is a *procedural* mechanism, not a substantive law, in order for an applicable employee to pursue his/her Title VII grievance. Although it does not address this in its Opinion, the Fifth Circuit, during oral argument, inquired of both Ms. Frank and Harris County whether GERA would apply and, thus, have afforded Ms. Frank relief for her Title VII claims.

A close reading, however, shows that GERA would not apply to the circumstances in the case at bar. Section 2000e-16c sets forth the application of GERA:

> (a) Application
>
> The rights, protections, and remedies provided pursuant to § 2000e-16b of this title shall apply with respect to employment of any individual chosen or

> appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof–
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policymaking level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Ms. Frank does not fall within any of the three categories — she was not on Constable Chambers' personal staff, did not serve in a policymaking level, nor serve as an advisor on constitutional or legal powers of Harris County Constable's office.

Thus, Ms. Frank could not invoke GERA to her aid or benefit. *Decker v. University of Houston*, 970 F. Supp. 575 (S.D. Tex. 1997). Besides, GERA is a procedural statute and, if she could even invoke GERA, the results would have no doubt been the same — that she was subjected to Title VII violations and correspondingly awarded damages as found by the jury. Ms. Frank is therefore left without any recourse or remedy for the unlawful discrimination inflicted upon her.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 15, 2004

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-21025

Yolanda FRANK,

Plaintiff-Appellant,

VERSUS

HARRIS COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas, Houston Division

(4:99-CV-2383)

Before BARKSDALE, GARZA and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:*

Plaintiff-Appellant Yolanda Frank ("Frank"), a former deputy for Defendant-Appellee Harris County (the "county"), appeals the district court's summary judgment dismissal

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of her 42 U.S.C. § 1983 claim. Frank also appeals the district court's grant of judgment as a matter of law on her Title VII *quid pro quo* harassment and retaliation claims, 42 U.S.C. § 2000e *et seq.* We AFFIRM.

BACKGROUND

Frank was hired on February 1, 1997, to serve as a deputy constable, under the supervision of Constable A.B. Chambers ("Chambers"), in the Absent Student Assistance Program division ("ASAP"), a contract program with the Houston Independent School District. Based on the affiliation with the school district, ASAP employees were hired for a limited period of one school year and let go at the end of each year. Employees submitted new employment applications for each following school year. Accordingly, Frank was terminated at the end of the year on May 11, 1998, and rehired on July 29, 1998, for the 1998-99 school year. Once rehired, Frank entered into a new 90-day probationary period, consistent with policy. Frank was terminated on October 16, 1998, within the 90-day probationary period. The parties dispute the reason for Frank's termination. Frank claims she was terminated for rejecting, yet not reporting, the numerous sexual advances of Constable Chambers. Frank describes at least six incidents of unwanted and offensive sexual advances and touchings she endured from Chambers. The county responds that Frank was terminated because of some five incidents of insubordination or failure to obey orders during her 90-day probationary period.

Frank filed suit against the county, alleging that Constable Chambers sexually harassed her on the job and

that she was wrongfully terminated. The county filed a motion for summary judgment as to all claims. The district court granted the county's motion for summary judgment on Frank's § 1983 claim and denied summary judgment as to the sexual harassment and retaliation claims arising under Title VII. By written memorandum and order, the district court held that: (1) Frank was an employee of Harris County; (2) Constable Chambers, as an elected official, was not an employee of Harris County; (3) Frank failed to establish a genuine issue of material fact as to whether the county had a well-settled custom or policy causing her injury and therefore that summary judgment was properly granted to the county on the § 1983 claim; (4) a genuine issue of material fact precluded summary judgment as to Frank's sexual harassment claim on a *quid pro quo* theory; and (5) a genuine issue of material fact precluded summary judgment as to Frank's retaliation claim.

The surviving Title VII claims were tried to a jury, and a verdict was rendered for Frank in excess of $400,000. After the jury returned its verdict, the county reurged its motion for judgment as a matter of law under Fed. R. Civ. P. 50, and the district court granted the county's motion by written memorandum and order. The district court reiterated its prior determination of the employment status of the individuals—that Frank was an employee of the county and Chambers, as an elected constable, was not an employee of the county. Then the district court granted judgment as a matter of law to the county on both Frank's *quid pro quo* harassment claim and retaliation claim.

Appendix A

DISCUSSION

Frank argues that three issues require reversal and remand. As explained here, we disagree.

I. Summary Judgment Properly Entered on § 1983 Claim

First, Frank argues the district court erred in granting summary judgment to the county on her § 1983 claim. This Court reviews the grant of summary judgment *de novo* and uses the same standard as does the district court in evaluating the motion, examining the record in the light most favorable to the nonmovant, here, Frank. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In order for the county to be liable under § 1983, Frank must show, among other things, either the unconstitutional action of policymakers or an unconstitutional policy or custom. *See Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). The district court correctly determined that Frank failed to raise a genuine issue of material fact as to whether any official policy or custom governed the alleged conduct and whether Chambers was the final policy maker. *See Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985) (holding elected constable not the final policymaker and therefore unconstitutional acts of elected county official not chargeable

against the county); *see also Drain v. Galveston County*, 979 F. Supp. 1101 (S.D. Tex. 1997) (holding county cannot be held liable for conduct of elected official constable under § 1983 because he is not final policymaker).

Frank argues on appeal that her case is distinguishable from those relied upon by the district court because Constable Chambers admitted in deposition testimony that he was the final policymaker, creating an issue that should have been submitted to the jury. The county disputes that Chambers so testified and argues that, even if he did, such testimony is merely a legal conclusion which is contrary to established law. As a matter of law in this Circuit, an elected county constable is not, absent specific facts not present in this case, the final policymaker such that his unconstitutional conduct may be chargeable against the county. *See Rhode*, 776 F.2d at 109-10.

> The determining factor, however, is neither that a constable is elected by voters from a subunit of the County nor that the commissioner's court controls his salary. The critical circumstance is that . . . a constable . . . was not given that discretion, or range of choice, that is at the core of the power to impose one's own chosen policy. It is true that a constable possesses a limited range of choice, which is essential even to virtually ministerial tasks. But a constable's range of choice is no greater than that, for example, of a peace officer who must decide whether to arrest for a misdemeanor committed in his presence.

Id. at 109.

Chambers's testimony is not controlling on the issue of whether, as a matter of law, he was the final policymaker. Moreover, Frank did not adduce evidence or argument, beyond this testimony, to support a finding that an unconstitutional custom or policy of sexual harassment existed. Because Frank failed to submit a genuine issue of material fact on the question of whether an unconstitutional custom or policy of sexual harassment existed, the district court properly granted judgment to the county on the §. 1983 claim.

II. Judgment as a Matter of Law on Frank's Title VII Claims

Next, Frank appeals the district court's grant of judgment as a matter of law under Rule 50 as to her Title VII claims for both *quid pro quo* harassment and retaliation. This Court reviews the grant of a Rule 50 motion *de novo*, applying the same standards as the district court applied and considering all the evidence in the light most favorable to the jury's verdict. *Resolution Trust Corp. v. Cramer*, 6 F.3d 1102, 1109 (5th Cir. 1993). "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party." Fed. R. Civ. P. 50(a)(1).

A. Frank's Title VII quid pro quo harassment claim

In determining that judgment should be entered for the county on Frank's Title VII *quid pro quo* harassment claim,

the district court made several initial findings, each now challenged by Frank. First, the district court found, initially on the motion for summary judgment and again— but without new evidence—on the Rule 50 motion, that Frank was employed by Harris County. The court applied the hybrid economic realities/control test as described in *Bloom v. Bexar County*, 130 F.3d 722 (5th Cir. 1997), and per this Court's instruction, analyzed the control factor under Texas law. Finding that the county exercises considerable control over deputies (e.g., salary and benefit provisions, tax withholding, and establishment of terms and conditions of employment), Frank was correctly held to be an employee of Harris County for purposes of Title VII.

Next, the court determined that Chambers was not employed by the county, primarily because he is an elected official who is not subject to the civil service laws of the state government. *See* 42 U.S.C. § 2000e(f). For purposes of Title VII, the Equal Employment Opportunity Act of 1972 provides that elected officials are not employees. *Id.* Frank argued to the district court and argues now on appeal that the county can be liable for Chambers's conduct—irrespective of his employment status—because he was Frank's supervisor. For this proposition, Frank relies upon *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *Burlington* does not support Frank's argument in this regard because the supervisor in *Burlington* was an employee of the defendant employer, a private corporation. 524 U.S. at 747. In *Faragher*, the Court considered a governmental employer, but again, the supervisor was an employee. 524 U.S. at 780 ("This case calls for identification of the

circumstances under which an employer may be held liable under Title VII . . . for the acts of a supervisory employee."). Neither case supports Frank's position.

This Circuit has recognized that employers may be liable under Title VII for the conduct of non-employees in the workplace when the employer knows of the harassment but fails to act. *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 387 (5th Cir. 1987). Based upon Chambers's status as a non-employee, Frank may state a Title VII claim against the county for Chambers's unconstitutional and tortious conduct, only if the county knew or should have known of the conduct and failed to take immediate and appropriate corrective action. *See* 29 C.F.R. § 1604.11(e).

The district court found that Frank adduced no evidence of the county's knowledge. The district court, in its order regarding summary judgment, believed that Frank filed her EEOC charge on January 22, 1998, thereby permitting time for the EEOC and Texas Commission on Human Rights to inform the county of the problem and conduct investigation. But to the contrary, at trial the undisputed fact emerged that Frank did not file her first complaint regarding Chambers's conduct until February 1999, four months after her employment ended. By Frank's own testimony, she did not report the offensive conduct until after her termination. Also, Frank did not report the conduct to the human resources department, to any of her supervisors, to the district attorney's office, or to the mental health program. Therefore, the district court's original assumption that the county had knowledge of the problem was incorrect; and in the subsequent order regarding the Rule 50 motion, the district court corrected this inaccuracy.

Frank argues that another individual's prior cause of action, in which the plaintiff complained of Chambers's conduct, *Moore v. Harris County*, No. 98- 01776 (S.D. Tex. filed June 5, 1998), provided the requisite knowledge to the county to support *quid pro quo* liability for a non-employee's conduct. The district court rejected this argument because *Moore* resulted in a judgment for Chambers on the merits, and therefore did not advance Frank's argument, and because the evidence of the existence of other complaints against Chambers was admitted solely for the purposes of showing Chambers's motive, opportunity, or intent to sexually harass Frank.

Even if the county knows or should know of harassment once a suit is filed and some evidence of harassment is presented, the *Moore* case is, on this record, insufficient to reverse the judgment for the county because no other evidence of the county's knowledge was presented and, most importantly, Frank does not argue that the testimony or depositions or other evidence presented in *Moore* put the county on notice of Chambers's conduct. Instead she merely argues that the case's existence is sufficient to provide notice. We disagree. On this record, we affirm the district court's judgment as matter of law on Frank's Title VII claim for harassment by a non-employee.

B. Frank's Title VII retaliation claim

The district court also entered judgment as a matter of law for the county on Frank's retaliation claim. To state a claim for retaliatory discharge under Title VII, Frank must show that: (1) she engaged in a protected activity; (2) the

employer took an adverse employment action against her; and (3) there was a causal connection between the protected activity and that adverse reaction. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001).

The court reversed the jury's verdict on this claim because it determined Frank failed to engage in a protected activity. A protected activity is "opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII." *Id.* (citing 42 U.S.C. § 2000e-3(a) and *Evans v. City of Houston*, 246 F.3d 344, 352-53 (5th Cir. 2001)). The district court found that Frank, by her own testimony, did not participate in a protected activity, that is, filing an EEOC complaint, until after her termination.

On appeal, Frank argues that the protected activity she engaged in was her "express rejection" of Chambers's sexual advances. But Frank provides no authority for the proposition that a single "express rejection" to Chambers constitutes as a matter of law a protected activity for purposes of retaliation. Also, Frank offers no explanation or evidence in support of the required element of causal connection. To demonstrate causation, Frank must adduce evidence that "but for" the protected activity, the adverse employment action would not have occurred. *See Mota*, 261 F.3d at 519 (internal quotation marks and citations omitted). Frank fails to explain on appeal, as below, how her opposition to Chambers's advances, which by her own testimony consisted largely of unexpressed disapproval and was not reported to the county or the EEOC prior to termination, caused her ultimate termination.

Therefore, we affirm the district court's grant of judgment as a matter of law on the retaliation claim.

CONCLUSION

Having fully considered the briefs, record on appeal and oral arguments of the parties, we conclude the district court properly entered judgment for the county on both the motion for summary judgment and the motion for judgment as a matter of law.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED SEPTEMBER 19, 2003

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-99-2383

YOLANDA FRANK,

Plaintiff,

VS.

HARRIS COUNTY,

Defendant.

MEMORANDUM OPINION

Plaintiff is Yolanda Frank, a former deputy constable for Precinct 7 in Harris County, Texas. Frank alleges that Harris County, through former Constable A.B. Chambers, an elected official, is liable for unlawful sexual harassment, retaliation and deprivation of civil rights under 42 U.S.C. § 1983.[1] The case was tried to a jury from April 7, 2003 through April 11, 2003. The jury returned a verdict in favor of Frank, and the

1. The Court granted Defendant's summary judgment motion on Frank's § 1983 claims, but denied summary judgment on the sexual harassment and retaliation claims

Appendix B

County has renewed its motion for judgment as a matter of law pursuant to Rule 50.[2]

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2. Federal Rule of Civil Procedure 50 provides in pertinent part:

(A) Judgment as a Matter of Law

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(B) Renewing Motion for Judgment after Trial: Alternative Motion for New Trial: If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-and may

(Cont'd)

Appendix B

The Court's previous denial of a motion for summary judgment does not prevent the possibility of a subsequent motion for judgment as a matter of law. *See Gross v. Southern Railway Company*, 446 F.2d 1057, 1060 (5th Cir. 1971). This rule recognizes that "at times the issues may be such that only after the agony of a full-blown trial may it authoritatively be determined that there was never really a decisive issue of fact at all." *Robbins v. Milner Enterprises, Inc.*, 278 F.2d 492, 497 (5th Cir. 1960).

In determining a Rule 50 motion the court must review the entire trial record in a light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Casarez v. Burlington Northern/SantaFe Co.*, 193 F.3d 334, 336 (5th Cir. 1999). The standard for

(Cont'd)

> alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
>
> (a) allow the judgment to stand,
>
> (b) order a new trial, or
>
> (c) direct entry of judgment as a matter of law; or
>
> (2) if no verdict was returned:
>
> (a) order a new trial, or
>
> (b) direct entry of judgment as a matter of law.

analyzing a motion for judgment as a matter of law[3] is well-settled in the Fifth Circuit:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence – not just the evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.

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3. In 1991, Rule 50 of the Federal Rules of Civil Procedure was amended. Pursuant to amended Rule 50, the "motion for directed verdict" and "motion for judgment notwithstanding the verdict" are now called "motions for judgment as a matter of law." *See Miller v. Rowan Companies, Inc.*, 55 F.Supp. 2d 568, 572 n. 3 (S.D. MS 1998).

> However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). This Court does not have the benefit of the trial transcript and must rely upon its own observation of the trial proceedings and the briefing of the attorneys. Pursuant to the standard set forth by the Fifth Circuit, the Court concludes that a reasonable trier of fact could not have found as the jury did in this case and grants Harris County's motion.

The following facts were adduced at trial through the uncontested testimony of witnesses and through documents received into evidence. Plaintiff, Yolanda Frank, was hired[4] on February 1, 1997 to serve as a deputy constable at Harris County Precinct No. 7. The County is organized in a military-style fashion and as a deputy constable, Frank was required to take and follow orders from Precinct 7's Chief Deputy, Captain, and Sargent, as well as other officers seated above her in the chain of command. Precinct 7's highest ranking officer was A.B. Chambers, who was elected as the Constable of Precinct 7 during the relevant time period.[5]

---

4. Prior to this time, Frank volunteered as a reserve deputy for Harris County.

5. Chambers served as the Constable of Precinct 7 from 1973 through 2000. When Chambers lost his bid for re-election in 2000, he retired. On the date of trial, Constable Chambers was approximately eighty-seven years old. Chambers admits that he was in good health at the time he ran for re-election and during the relevant time period for this case.

Appendix B

Frank served in Precinct 7's Absent Student Assistance Program Division ("ASAP"), a contract program with the Houston Independent School District ("HISD"). Because ASAP was funded by HISD, ASAP employees were not hired on a continuing basis. Rather, the employees would be hired for the limited time period of one school year and let go at the end of each school year. At the beginning of the next school year, individuals could submit new applications for employment. There was no guaranty or obligation, however, that an ASAP employee would be rehired the following year. If rehired, the employee would enter into a new 90-day probationary period, which was regularly reinstated at the beginning of every contract year.

In accordance with ASAP hiring practices, Plaintiff's initial employment was terminated in May 1997. She was then rehired in August 1997 and July 1998. When Frank was first hired in February 1997, and each time she was rehired, she received and signed employee compensation forms from Harris County. The County was responsible for paying Frank's salary, issuing her paychecks, and withholding taxes from her salary. She also signed three separate documents, one for each hire, that stated that she received, read, understood, and agreed to abide by the Harris County Personnel Regulations Manuel, which contained Harris County's sexual harassment policy and showed employees what procedures to take to report incidents of sexual harassment.

Plaintiff maintains that she was unlawfully terminated by Harris County because she consistently rejected numerous, unspecified, sexual advances made by Constable Chambers.

Appendix B

At trial, Frank testified that the first incident of sexual harassment occurred in December 1996, or January 1997, while Frank volunteered as a reserve deputy, and the second incident occurred in February 1997, after she had been hired as a deputy constable. Although Frank testified she was harassed at least three times prior to May 1997, Frank returned to work in August 1997. During that summer, Frank adnuts that she did not seek alternative employment. Frank also testified that from August 1997 to May 1998, she was sexually harassed by Chambers at least seven times. According to Frank's testimony, she did not ask Constable Chambers to stop the harassment until March 1998, and he did not adhere to her request. Despite the harassment and Chambers refusal to stop, Frank admits that she did not seek alternative employment during the summer. In August 1998, Frank returned once again to Harris County's ASAP division.

Frank testified that each time she was harassed by Chambers, the same pattern or sequence of events occurred: (1) Constable Chambers called Frank into his office; (2) once Frank appeared in his office, he would "circle" Frank; (3) after "circling" Frank, Chambers would attempt to kiss and touch Frank inappropriately. According to Frank's testimony, she was "shocked" each time she was harassed and suffered from severe mental anguish as a result of the harassment. There is no evidence or trial testimony that Frank ever fought back, sought different employment, or took advantage of the County's programs for psychiatric care to help her cope with her alleged mental anguish resulting from these incidents. The record also shows that Frank failed to report the alleged sexual harassment to anyone at Precinct 7, including the human resource's department; failed to report

the incident to the district attorney's office; and failed to follow the County Personnel Regulations Manual with regard to sexual harassment even though she knew that she needed to report the incidents to Officer Wells. Frank admits, and it is uncontroverted, that she only told her fellow co-workers about the alleged harassment. The first actual report of sexual harassment did not occur until February 1999, when Frank filed her EEOC charge, approximately four months after her employment with Harris County was terminated.

Harris County alleges that Frank was terminated because of her failure to follow orders, not because she refused Constable Chamber's alleged sexual advances. The County provides evidence of five incidents involving insubordination, failure to obey orders, failure to report to duty, and failure to follow County rules regarding personal use of County vehicles occurring on August 17, 1998, August 22, 1998; August 29, 1998, September 25, 1998, and October 9, 1998. The result of these incidents eventually led to Plaintiffs termination October 16, 1998, a date within the 90-day probationary period for the 1998-1999 ASAP contract.

At the close of Plaintiff's case; Harris County moved for judgment as a matter of law. Harris County's motion is based upon the following three arguments: (1) Plaintiff Yolanda Frank was not an employee of Harris County; (2) A.B. Chambers was not an employee of Harris County; and, (3) A.B. Chambers was not Harris County's agent. The Court took the matter under advisement and Defendant proceeded with its case. At the close of trial, the County re-urged its motion for judgment as a matter of law. The Court now writes to address the motion.

Appendix B

Harris County first argues that Frank cannot be classified as an employee of the County. In the Memorandum & Order (Instrument No. 38) on Defendant's summary judgment motion, this Court concluded otherwise and found that Frank is a Harris County employee. In so doing, the Court applied the summary judgment evidence to the hybrid economic realities/control test as described in *Bloom v. Bexar County, Texas*, 130 F.3d 722 (5th Cir. 1997) to determine if the County is an employer under Title VII. The Court specifically noted that the Fifth Circuit, in *Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458 (5th Cir. 2001) established that state law is crucially important to the determination of whether a county qualifies as an "employer" of a deputy under Title VII. Because control is the most important factor in the test, the Court specifically noted that Texas exerts substantial control over its deputies by (1) determining if the constable has shown that it is "necessary to appoint a deputy in order to properly handle the business of the constable's office that originates in the constable's precinct," *Tex. Loc. Gov't. Code Ann. & 86.011(a)*; (2) determining and paying their salaries, *Tex. Loc. Gov't. Code Ann. §§ 152.001 152.011*; (3) withholding taxes and making payroll deductions; (4) determining the total number of deputy constables that can be appointed, *Tex. Loc. Gov't Code Ann. §§ 151.002, 151.003*; (5) specifically reviewing, approving, or denying each of the constable's appointments, *Tex. Loc. Gov't Code Ann. §§ 151.002, 151.003*; (6) granting a constable the authority to appoint a deputy after the constable has specifically identified the person he wishes to appoint, *Tex. Loc. Gov't. Code Ann. §§ 86.011(a) & 151.003*; and, (7) reviewing all necessary paperwork and setting a new salary if a deputy constable is promoted, *Tex. Loc. Govt. Code Ann. §§ 152.001,*

152.011. The Court also noted that in a similar case, *Moore v. Harris County* (H-98-1776); the Honorable Ewing Werlein, Jr., United States District Judge for the Southern District of Texas, was also presented with exactly the same specific question of whether a deputy constable of Precinct 7, the same position held by Frank, qualifies as an employee of Harris County. Judge Werlein also answered this question affirmatively.

In its renewed motion, Harris County once again asserts that Frank has not satisfied the Fifth Circuit's hybrid economic realities/common law control test. However, Harris County fails to provide any new issues of law or fact in its motion, thus leaving no reason for this Court to depart from its earlier reasoning. The Court writes now only to supplement its earlier order after having had the benefit of trial.

The trial evidence conclusively shows that Harris County possessed requisite control over Frank's employment because it paid Frank's salary, provided benefits, withheld taxes, and established the terms and conditions of her employment. The evidence also showed that Frank was given a copy of and was subjected to Harris County's employee regulations and that Harris County provided Frank with her employee's compensation forms during her employment.

After reconsidering this issue, the Court also finds that Frank is an employee of Harris County pursuant to the plain language of Title VII:

> (a) The term "**person**" includes one or more individuals, **governments, governmental**

> **agencies, political subdivisions**, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers. (b) The term "**employer**" means a person engaged in an industry affecting commerce who **has fifteen or more employees for each working day in each of twenty or more calendar weeks** in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 US.C. § 2000e(a), (b) (Emphasis added). The trial evidence undisputedly shows that Harris County is a "person" because it is a government, governmental agency, and/or political subdivision whose work affects commerce, employs the requisite number of employees, and is not excluded under any of the exceptions listed in 42 U.S.C. § 2000e(b). It is undisputed that Harris County employs more than five hundred employees. Moreover, both the Fifth Circuit and

Southern District of Texas have already concluded that Harris County qualifies as an employer for county deputy constables for Title VII purposes. *See Rutherford v. Harris County*, 197 F.3d 173 (5th Cir. 1999); *Moore v. Harris County* (H-98-1776).

In its renewed motion, Harris County also challenges Plaintiffs assertion that Constable Chambers is an "employee" or "agent" of the County. The Equal Employment Opportunity Act of 1972 provides that elected officials are not "employees" unless these individuals are subject to the civil service laws of a State government. 42 U.S.C. § 2000e(f). In its previous Memorandum & Order (Instrument No. 38), this Court found that because Constable Chambers is an elected official, he is not considered an "employee" of Harris County under Title VII. Nonetheless, the Court concluded that Harris County could be found liable for Constable Chamber's actions pursuant to 29 C.F.R. § 1604.11(e). It states:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Appendix B

Although the EEOC Guidelines are not controlling, they represent a body of experience to which courts may resort for guidance. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). This particular guideline has been utilized by a number of federal courts, including the Fifth Circuit, to recognize that employers may be liable for harassment committed by non-employees in the workplace where the employer knows of the harassment but fails to act. *Garziano v. E.I. Du Pont de Nemours & Co.*, 818 F.2d 380, 387 (5th Cir. 1987) ("Federal law imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment, including redressing *known occurrences of sexual harassment*. "(Emphasis added.)); *Kudatsky v. Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445, * 12-13 (S.D.N.Y. 1997) ("It is increasingly recognized that employers may be liable for harassment committed by nonemployees in the workplace where the employer knows of the harassment but fails to act." (Emphasis added.)); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027 (D. Nevada 1992); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Il. 1997)(where plaintiff alleged that an elected official sexually harassed her, the court noted potential liability for the employer) (citing *Hallberg v. Eat'N Park*, 1996 U. S. Dist. LEXIS 3573, *34-35 (W.D. Pa. 1996) (specifically noting that the employer must have knowledge of the harassment and then fail to take corrective action in order to be held liable); *Magnuson v. Peak Technical Serv., Inc.*, 808 F. Supp. 500, 512-13 (E.D. Va. 1992) (noting that the EEOC emphasizes the employer's knowledge of the harassment); *Moffett v. Gene B. Click Co.*, 621 F. Supp. 244, 272 (N.D. Ind. 1985) (noting that a parties' supervisor status is a nonissue because the Court must focus on the employer's

knowledge and whether or not it immediately took corrective action); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985) (noting potential employer liability for the acts of non-employees); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (citing § 1604.11(e) and stating that "the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace")).

Hence, under 29 C.F.R. § 1604.11(e), Plaintiff must prove that Harris County knew or should have known about the alleged sexual harassment suffered by Frank as a result of Constable Chambers. The Court's examination of the summary judgment evidence revealed that Plaintiff provided no evidence concerning Harris County's knowledge of the alleged harassment to Frank. Nonetheless, when the Court issued its Memorandum & Order (Instrument No. 38), it reasoned that Harris County would necessarily have some knowledge regarding the alleged sexual harassment between Constable Chambers and Frank through the filing of her complaint with the EEOC and the Texas Commission on Human Rights (TCHRA) because the TCHRA requires administrative investigation and attempts at conciliation before a complaint is afforded to the courts, TEX. LAB. CODE ANN. §§ 21.201-.207, .209-210 (Vernon Supp. 1996). Harris County would have therefore been aware of the Chamber's unwelcome conduct even if Plaintiff had never specifically filed a claim with Harris County.

At that time, however, the Court was under the impression that Frank filed her EEOC charge on January 22, 1998. This is incorrect. According to Frank's own testimony,

the first time she filed a complaint regarding the alleged harassment was February, 1999, four months after her employment with the County was terminated. Frank also confirmed that she never filed a report with the County's human resources department, failed to tell any of her supervisors at Precinct 7 about the harassment, failed to report the harassment to the district attorney's office, failed to take advantage of the County's mental health program despite complaints of severe mental anguish problems, and failed to report the sexual harassment to Officer Wells, although she admitted that she knew she was supposed to report such incidences to that individual. Additionally, all of the evidence and testimony presented at trial were consistent with Frank's testimony that the first time she reported sexual harassment was in February 1999.

The only proper remedy left to this Court is to grant Defendant's motion for judgment as a matter of law. .As explained by the Fifth Circuit, "Judgment as a Matter of Law should not be granted unless `the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion-" *Palasota v. Haggar Clothing*, 2003 U.S. App. LEXIS 18171, *11 (September 3, 2003) (quoting *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235 (5th Cir. 2001). Plaintiff's only argument regarding Harris County's knowledge is derived from the fact that Constable Chambers was accused of sexually harassing another Precinct 7 employee in another case, *Moore v. Harris County* (H-98-1776), in which Constable Chambers prevailed on the merits. Because Constable Chambers was found not liable for sexual harassment in the Moore case, that case does not

advance Plaintiffs position. This evidence was admitted at trial for the limited purpose of showing Chambers' motive, opportunity, or intent to sexually harass Frank. The jurors were specifically instructed that "Evidence that Constable Chambers sexually harassed an employee other than Mrs. Frank on another occasion is not evidence or proof that Mrs. Frank was sexually harassed by Constable Chambers." *Court's Jury Instructions, Special Interrogatory No. 1.* Given that this is the only evidence offered by Plaintiff to show that Harris County either knew or should have known that Frank was being harassed, that it cannot be used to prove harassment, and that Constable Chambers was found not liable, there is no evidence to support the jury's findings that the County should be liable on the sexual harassment claim.

As a matter of law, the jury's findings on the retaliation claim should be overturned as well. To prevail on a claim for retaliatory discharge under Title VII, 42 U.S.C. § 2000e-3(a), a plaintiff must show that (1) she engaged in an activity protected by Title VII, (2) the employer took an adverse employment action against her, and, (3) there was a causal connection between the protected activity and that adverse reaction. *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 519 (5th Cir. 2001); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995). An employee has engaged in activity protected by Title VII if he has "opposed any practice made an unlawful employment action' 'by Title VII or if he has "made a charge, testified, assisted, or participated in any manner of investigation, proceeding, or hearing" under the statute. 42 US.C § 2000e-3(a); *Mota*, 261 F.3d at 519. "Adverse employment actions" includes only "ultimate employment

decisions . . . 'such as hiring, firing, granting leave, discharging, promoting, and compensating.'" Id. The plaintiff must demonstrate that he had at least a reasonable belief that the practices he opposed were unlawful. *Mayberry*, 55 F.3d at 1092; *Long v. Easylield College*, 88 F.3d 300, 304 (5th Cir. 1996); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). To demonstrate causation, plaintiff must demonstrate that "but for" the protected activity, the adverse employment action would not have occurred. *Mota*, 261 F.3 d at 519. In the instant action, Frank, by her own uncontroverted testimony, did not participate in a protected activity until after her employment with Harris County was terminated. Therefore, as a matter of law, Plaintiff cannot prove causation and Defendant's motion should be granted.

On a final note, the Court writes to discuss an issue that was first presented in the parties' post-trial briefs.[6] Although the Court's holding does not turn upon this issue, it is included here with the express purpose of supplementing the Court's previous findings. Plaintiff, in an attempt to prove that Chambers is an employee or agent of the County,[7] argues that Texas law provides that constables are subject to the civil service laws of Texas and cites TEX. LOC. GOV'T CODE ANN. §§ 158.001 (Vernon 2003) (which provides that an "employee" is a person included in the coverage of county

6. This issue was first raised by the Plaintiff and later responded to by Harris County.

7. Under 42 U.S.C. § 2000e(f), elected officials cannot be considered employees unless they are subject to the civil service laws of a State government, governmental agency, or political subdivision.

civil service system as the result of an election held under Section 158.007), Section 158.007 (providing that Harris County voters may elect to maintain the county civil service system that judicial notice is taken is maintained), and Section 86.0021 (defining Constable eligibility qualification and not providing for term limitations so Constables are within the civil service system). Harris County provides evidence, however, that Plaintiffs blanket assertions are "totally baseless" because (1) no county civil service system of the type described in TEX. LOC. GOV'T CODE ANN. §§ 158.001-158.015 exists; (2) the Commissioner's Court of Harris County has never adopted an order creating a county civil service system in accordance with TEX. LOC. GOV'T CODE ANN. § 158.003; and, (3) the Commissioner's Court of Harris County has never called an election on the question of the creation of a county civil service system in accordance with TEX. LOC. GOV'T CODE ANN. § 158.004. These facts are provided through the affidavit of Beverly B. Kaufman, the County Clerk of Harris County who serves as the clerk of the Commissioner's Court and is the chief election official of Harris County. Part of her duties include keeping the Commissioner's Court's books, papers, records, and effects in accordance with the provisions of TEX. LOC. GOV'T CODE ANN. § 81.003. In light of this evidence, and Plaintiff s failure to offer any evidence[8] indicating otherwise, the Court

8. Plaintiff also argues that (1) Harris County has an "implied" county civil service system because the County has a population of over 1.8 million people; and, (2) the existence of Harris County's implied county civil service commission is evidenced because the County has adopted Personnel Regulations that encompasses some of the same rules that could be enforced by a civil service commission. (Cont'd)

supplements its earlier conclusion that Constable Chambers is not an "employee" of the County.[9]

Accordingly, the Court

ORDERS that Defendant Harris County's Renewed Motion for Judgment as a Matter of Law (Instrument No. 72) is **GRANTED**.

SIGNED at Houston, Texas, this 18th day of September; 2003.

s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

(Cont'd)
There is no evidence to support the existence of an "implied" county civil service system or that a county civil service system could be created in such a manner. Plaintiff s only evidence is TEX. LOC. GOV'T CODE ANN. § 158.008(e), which merely states that "A member of the commissioner's court of a county with a population of 1.8 million or more *is not prohibited* from being appointed to the civil service commission." (Emphasis added). Contrary to Plaintiff's blanket assertions, this statute does not establish the existence of an implied county civil service system. The only evidence presented on this issue was presented by the County, and it shows that no such county civil service system exists.

9. The Court also notes that the term "employee", as defined in TEX. LOC. GOV'T CODE ANN. § 158.001(2) "does not include a person who holds an office the term of which is limited by the constitution of the state." The term of office for a county constable is limited by Article 5, § 18 of the Texas Constitution. Hence, even if Harris County did have a county civil service system. Constable Chambers would not qualify as an employee.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 19, 2005

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-21025

YOLANDA FRANK

Plaintiff - Appellant

v.

HARRIS COUNTY

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before BARKSDALE, GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Appendix C

ENTERED FOR THE COURT:

s/ Harold R. DeMoss
United States Circuit Judge